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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 113

UNITED STATES SHIPPING BOARD EMERGENCY FLEET CORPORATION, petitioner

v.

WESTERN UNION TELEGRAPH COMPANY

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONER

OPINION BELOW

The decision of the trial court, the Supreme Court of the District of Columbia, will be found in the Bill of Exceptions. (R. 55, 56.) The opinion of the Court of Appeals of the District of Columbia (R. 59–63) is reported in 13 F. (2d) 308.

JURISDICTION

The judgment of the Court of Appeals of the District of Columbia was entered on June 1, 1926. (R. 64.) Petition for certiorari was filed on August 30, 1926, and was granted on November 23,

1926. (R. 65.) The jurisdiction of this Court to issue the writ is found in Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

THE QUESTION PRESENTED

The question presented is whether the benefits of Section 5266, R. S., which provides for priority, at rates fixed by the Postmaster General annually, for "telegrams between the several Departments of the Government and their officers and agents, in their transmission over the lines of any telegraph company to which has been given the right of way, timber, or station lands from the public domain," are applicable to telegrams sent by the petitioner in carrying out the duties and functions duly delegated to it by the United States Shipping Board pursuant to the Merchant Marine Act, 1920 (c. 250, 41 Stat. 988).

STATUTES INVOLVED

The Post Roads Act (approved July 24, 1866, c. 230, 14 Stat. 221) originally contained four sections, which, with minor amendments, are now contained in Sections 5263 to 5266, Revised Statutes.

The title to the Act as passed originally was as follows:

> ***An Act to aid in the Construction of Telegraph Lines, and to secure to the Government the Use of the same for postal, military, and other Purposes.***

Section 5263, R. S. (U. S. C., Title 47, Sec. 1), provides:

> Any telegraph company now organized, or which may hereafter be organized, under the laws of any State, shall have the right to construct, maintain, and operate lines of telegraph through and over any portion of the public domain of the United States, over and along any of the military or post roads of the United States which have been or may hereafter be declared such by law, and over, under, or across the navigable streams or waters of the United States; but such lines of telegraph shall be so constructed and maintained as not to obstruct the navigation of such streams and waters, or interfere with the ordinary travel on such military or post roads.

Section 5264, R. S. (U. S. C., Title 47, Sec. 2), provides:

> Any telegraph company organized under the laws of any State shall have the right to take and use from the public lands through which its lines of telegraph may pass, the necessary stone, timber, and other materials for its post, piers, stations, and other needful uses in the construction, maintenance, and operation of its lines of telegraph, and may preempt and use such portion of the unoccupied public lands subject to preemption through which their lines of telegraph may be located as may be necessary for their stations, not exceeding forty acres for each sta-

tion; but such stations shall not be within fifteen miles of each other.

Section 5266, R. S. (U. S. C., Title 47, Sec. 3), provides:

> Telegrams between the several Departments of the Government and their officers and agents, in their transmission over the lines of any telegraph company to which has been given the right of way, timber, or station lands from the public domain shall have priority over all other business, at such rates as the Postmaster General shall annually fix. And no part of any appropriation for the several Departments of the Government shall be paid to any company which neglects or refuses to transmit such telegrams in accordance with the provisions of this section.

The pertinent provisions of the Merchant Marine Act relating to the functions of the Shipping Board and of the Fleet Corporation and the sections of Appropriation Acts providing public funds for the activities of the Shipping Board and Fleet Corporation are in the appendix.

STATEMENT

This suit was begun in the Supreme Court of the District of Columbia by this respondent, The Western Union Telegraph Company, against the petitioner to recover the commercial rate on telegrams transmitted by the respondent for the petitioner in June and July, 1922. After the suit was begun the government rate was paid without prejudice, leaving in dispute the difference between the gov-

ernment rate and the commercial rate, the controversy being whether telegrams sent by the Emergency Fleet Corporation are entitled to the government rate. Some of the messages were sent by the Fleet Corporation, its officers or agents, to other officers or agents of that corporation or to other departments or officials of the United States; some were sent by the Fleet Corporation, or its officers or agents, to persons who were not officers or agents of the Fleet Corporation or of any branch of the government of the United States. (R. 7.) The cost of sending all of the messages must be borne out of public funds appropriated by Congress.

The case was tried to a court without a jury (R. 53) on an agreed statement of facts (R. 5), adopted by the court as its findings (R. 56). The Supreme Court of the District entered a judgment for this respondent on the ground that all the messages took the commercial rate, which was affirmed by the Court of Appeals of the District.

On June 8, 1867, respondent accepted the benefits and assumed the obligations of the Post Roads Act, and thereby became obligated to give priority to "telegrams between the several Departments of the Government and their officers and agents" at rates to be annually fixed by the Postmaster General. (R. 6.) Respondent charges the public generally certain uniform rates, commonly called "commercial rates," in conformity with the Interstate Commerce Act, as amended (Sec. 400, c. 91, 41 Stat. 456, 474–475; U. S. C., Title 49, Sec. 1), but the Post-

master General has annually fixed the rates to be charged by respondent and other telegraph companies for telegrams and cablegrams "between the several Departments of the Government and their officers and agents." These government rates for the months of June and July, 1922, when the messages involved in this case were dispatched, were forty per cent of the commercial rates for telegrams and fifty per cent of the commercial rates for cablegrams. (R. 6.)

It appears from an opinion of the Attorney General (14 Op. A. G. 278, R. 19) that the extent of respondent's obligations under the Post Roads Act was questioned in a letter to the Postmaster General dated June 20, 1873, wherein respondent suggested that "the test, applicable to all cases where claim is made that messages should be sent at Government rates, should be this: If the tolls are to become a charge against the United States, payable out of the Treasury, then the message should be sent at Government rates * * *." This letter was referred to the Attorney General who ruled that the only limitation applicable to a claim for the government rates is that "the telegraphing must be in cases where the rates are payable out of public moneys, or are to be accounted for to the Government by the officer making the expenditures."

From the date of the respondent's acceptance of the benefits and assumption of the obligations of the Post Roads Act, the respondent has extended the government rates for telegraphic messages, with

the right of priority in transmission thereof, to the Executive Departments headed by Cabinet Officers, to the judicial and legislative branches of the government, and to the following (with the exception with regard to the petitioner hereinafter stated) (R. 18–19):

Interstate Commerce Commission.
United States Shipping Board.
United States Shipping Board Emergency Fleet Corporation.
Federal Power Commission.
War Finance Corporation.
United States Railroad Administration.
Railroad Labor Board.
The Panama Canal.
The Federal Reserve Board.
The Federal Trade Commission.
United States Tariff Commission.
General Accounting Office.
Alien Property Custodian.
Civil Service Commission.
United States Bureau of Efficiency.
United States Employees' Compensation Commission.
Pan American Union.
Smithsonian Institution.
Inter-American High Commission—United States Section.
National Home for Disabled Volunteer Soldiers.
Government of the District of Columbia.
Veterans' Bureau.
Federal Board for Vocational Education.
United States Interdepartmental Social Hygiene Board.

Continuously from the time of the organization of the petitioner until May 23, 1922, the respondent accepted all messages of the petitioner and charged for their transmission at the government rates and gave them priority in transmission over commercial rates, without questioning that the petitioner was entitled to the government rates and priority. On or about May 23, 1922, the respondent sent a communication to the petitioner for the first time denying the applicability of the government rates to all Fleet Corporation messages, and giving notice that the commercial rates would be thereafter applied to such messages. (R. 18.) Following this notice, bills were presented at the commercial rates for all messages transmitted during June and July, 1922. On July 18, 1922, the Chairman of the United States Shipping Board requested the opinion of the Comptroller General as to whether petitioner should pay the bills so rendered by respondent at the commercial rates. Thereupon the Comptroller General ruled (2 Comp. Gen. Dec. 38) that the status of petitioner as an agent of the United States Shipping Board was fixed by Sections 12 and 35 of the Merchant Marine Act, 1920; that the status of the funds expended by petitioner was fixed by Section 14 of said Act and the various Acts making direct appropriations for its expenses, etc.; and that petitioner's telegrams were subject to the provisions of Section 5266, R. S., and the rates fixed by the Postmaster General thereunder. In accord-

ance with this decision, payment of said bills at the commercial rates was refused and the present suit was instituted by respondent.

After the filing of the declaration herein the petitioner paid the respondent for the messages in question at the government rates, pursuant to stipulation and without prejudice to the contentions of either party hereto, so that the suit is now a claim for the unpaid difference between the government rates and the commercial rate on the aforesaid messages. (R. 7.)

Petitioner is a corporation, organized by the United States Shipping Board pursuant to the authority vested in said Board by Section 11 of the Shipping Act, 1916 (c. 451, 39 Stat. 728, 731; U. S. C., Title 46, Sec. 810), to carry out the purpose of said Act, and was incorporated under the laws of the District of Columbia on April 16, 1917. (R. 8.) During the period from July 11, 1917, to June 5, 1920, petitioner acted as an agent of the United States, in carrying out the government's emergency ship building, ship requisitioning, and ship operation programs, pursuant to delegations of authority contained in Acts of Congress, Executive Orders and resolutions of the United States Shipping Board. (R. 8, 9.)

The Merchant Marine Act, 1920 (Act June 5, 1920, c. 250, 41 Stat. 988), repealed certain sections of former Acts and amended other sections of such Acts. Section 4 provided for a transfer to the

Shipping Board of all vessels and other property or interest of whatsoever kind acquired by the President through any agency whatsoever in pursuance of the Acts referred to in the section, with the exception of vessels and property the use of which was, in the opinion of the President, required by any other branch of the government service, and of vessels in the military or naval service of the United States. Section 5 authorized and directed the Board to sell, as soon as practicable, all of the vessels referred to in Section 4, or otherwise acquired by the Board. Section 7 authorized and directed the Board to investigate and determine what steamship line should be established, and to sell or charter vessels to responsible citizens who would agree to establish such lines, or to operate vessels on such lines temporarily in case sales or charters for that purpose could not be made. Section 12 provided that vessels might be reconditioned and kept in suitable repair, and, until sold, should be managed and operated by the Board or chartered or leased by it, and that the United States Shipping Board Emergency Fleet Corporation should continue in existence and have authority to operate vessels until all vessels were sold. Section 35 provided that the power and authority vested in the Board by the Act, except as therein otherwise specifically provided, might be exercised directly by the Board or by it through the Emergency Fleet Corporation.

A resolution of the Shipping Board adopted September 30, 1921, provided that the power and authority vested in the Shipping Board by the Merchant Marine Act, 1920, should, until otherwise ordered by the Board, "be exercised by it through the United States Shipping Board Emergency Fleet Corporation" in various activities specifically set forth in the resolution. (R. 30–31.) The resolution related solely to the delegation of authority to the Emergency Fleet Corporation in connection with certain activities which the Merchant Marine Act authorized the Shipping Board to carry on, and contained no reference of any kind to any activities of the Fleet Corporation which it, as a corporate entity, was empowered to carry on as principal and not as mere agent of the Shipping Board.

It appears from the agreed statement of facts (R. 14) that during the period when the messages involved in this suit were sent, and at all times subsequent thereto, the operations of the Fleet Corporation have been exclusively certain designated activities corresponding to the activities specifically delegated to it by the resolution of the Shipping Board dated September 30, 1921, and that "in doing the foregoing the Fleet Corporation has at all times since September 30, 1921, and until January 10, 1924, conformed to the directions with regard thereto contained in the resolution of the United States Shipping Board adopted September 30, 1921." Since, as pointed out above, the resolution of September 30, 1921, contained no directions with

regard to any activities of the Emergency Fleet Corporation other than those carried on by it as agent of the Shipping Board under authority delegated by the Board, the statement in the agreed statement of facts that in all of its operations the Fleet Corporation conformed to the directions with regard thereto contained in the resolution, amounts to an assertion that during the time in question the Fleet Corporation carried on no operations in which it as a corporate entity was principal, and that all of its operations were performed as agent of the Shipping Board.

Section 14 of the Merchant Marine Act, 1920, provided that after July 1, 1921, the net proceeds derived by the Shipping Board from activities authorized by the Act, or by earlier Shipping Acts, less such an amount as might be authorized annually by Congress to be withheld as operating capital, and less such sums as might be needed for the insurance and construction loan funds provided for by other sections of the Act, should be covered into the Treasury of the United States as miscellaneous receipts. Congress has annually reappropriated such revenues, and since they have been insufficient to cover petitioner's expenses as agent of the Shipping Board, Congress has from time to time appropriated additional large sums of money for such expenses. (E. G. Act June 5, 1920, c. 235, 41 Stat. 874; Act March 4, 1921, c. 161, 41 Stat. 1367; Act August 24, 1921, c. 89, 42 Stat. 192; Act June 12, 1922, c. 218, 42 Stat. 635.)

SPECIFICATIONS OF ERROR TO BE URGED

Petitioner urges that the Court of Appeals of the District of Columbia erred in affirming the judgment of the Supreme Court of the District and—

1. In holding that in sending the messages in controversy petitioner was not acting as an agent of the United States Shipping Board, a department of the government within the meaning of Section 5266, R. S.

2. In holding that respondent may be permitted to deny priority in transmission and the government rates on any messages which are to be paid for from public funds.

3. In failing to give proper weight to the practical construction placed upon the terms of a contract by the parties thereto and followed in a course of dealing over a period of many years.

SUMMARY OF ARGUMENT

The words "Departments of the Government," as used in Section 5266, R. S., include all branches, bureaus, and other establishments of the government, and do not refer only to those main executive departments which are headed by cabinet officers. There is no reason to suppose that Congress intended that the words should be given a restricted meaning, and the construction of the Act adopted by the parties ever since its passage is against such a meaning.

It follows that the Shipping Board is a department of the government within the meaning of Sec-

tion 5266, R. S. The record shows that the Emergency Fleet Corporation, in sending the messages here involved, was not acting for its own corporate account, but was acting merely as an agent of the Shipping Board under authority delegated pursuant to the Merchant Marine Act, 1920.

It is immaterial that the Fleet Corporation can act only through an officer or agent, and that where an employee of the Fleet Corporation performs acts lawful for an agent of the Fleet Corporation but unlawful for an agent of the United States he is not to be regarded as an agent of the United States for purposes of determining whether he has violated a criminal statute. The acts of the officers and agents of the Fleet Corporation, duly authorized, in connection with activities delegated to the Fleet Corporation by the Shipping Board, are the acts of the Fleet Corporation itself as agent of the Shipping Board.

The activities of the Fleet Corporation here involved, consisting under the Merchant Marine Act of disposition of shipping property acquired by the government for war purposes and operation of vessels to such extent as might be necessary in order to establish and maintain an adequate merchant marine, were governmental in character. In any event, Section 5266, R. S., makes no distinction between governmental and commercial activities. Its purpose is to effect a saving for the public treasury, and the United States and the respondent have construed it for many years as being applicable to

all messages the cost of which is a charge against the public treasury.

Section 5266, R. S., should be construed as applicable to telegrams to or from outside parties, not connected with the government, if the cost thereof is a charge against the public treasury. This has been the construction acted upon by the parties hereto for many years. Where the government bears the expense of a message sent by one of its agents to a private individual as it does in the case of a message sent by him to another agent of the government, the purpose of the statute requires that it be equally applicable to both messages. The debates in the Senate on the bill which finally became the Post Roads Act show that it was the intention of Congress that the rates fixed by the Postmaster General should be applicable to all governmental messages paid for out of public funds.

ARGUMENT

I

IN SENDING THE MESSAGES IN CONTROVERSY THE EMERGENCY FLEET CORPORATION WAS ACTING AS AN AGENT OF A DEPARTMENT OF THE GOVERNMENT WITHIN THE MEANING OF THE POST ROADS ACT

While the section of the Post Roads Act, now known as Section 5266, R. S., refers to telegrams between "the several Departments of the Government and their officers and agents," it seems clear that the word department was intended to include

all branches, bureaus, and other establishments of the government, and was not intended to refer only to those main executive departments which are headed by cabinet officers. There is no reason to suppose that Congress intended that the word "Department" should be given such a restricted meaning that the benefits of the Post Roads Act would depend on the form of the executive organization through which any particular governmental activities were carried on. It is more logical to suppose that the Post Roads Act contemplated that all governmental activities should be entitled to the benefits of the Act. That this has been the construction of the Act adopted by the parties ever since its passage is apparent from the record. Priority in transmission of messages and the government rate have been granted by the respondent to numerous governmental boards, commissions, and bureaus, as well as to the judicial and legislative branches of the government. (R. 18–19.)

It follows that the Shipping Board is a department of the government within the meaning of Section 5266, R. S. Moreover, in its brief in opposition to the petition for certiorari, the respondent expressly disclaimed that it contended that the Shipping Board was not such a department of the government.

The Shipping Board, then, being a department of the government, the further question is whether the Emergency Fleet Corporation was acting as an agent of the Shipping Board in sending the mes-

sages involved in this case. We do not contend that the Emergency Fleet Corporation is itself a department of the government. Nor do we contend that because the Emergency Fleet Corporation is, in a broad sense, an operating agency or instrumentality of the government, which owns all of its capital stock (*The Lake Monroe*, 250 U. S. 246, 254; *United States* v. *Strang*, 254 U. S. 491, 493; *Sloan Shipyards* v. *United States Fleet Corporation*, 258 U. S. 549, 567; *United States* v. *Walter*, 263 U. S. 15, 18; *United States ex rel. Skinner & Eddy Corpn.* v. *McCarl*, decided by this Court October 10, 1927), the Fleet Corporation is entitled to priority in transmission and the government rate for messages sent by it on its corporate account. If the activities of the Fleet Corporation here involved had been conducted wholly on its corporate account, and the United States were interested only as a stockholder of the Fleet Corporation, the situation presented would differ from that presented by the record in this case, and it may be that the case would be governed by *United States Bank* v. *Planters' Bank*, 9 Wheat. 904, and *Commercial Pacific Cable Co.* v. *Philippine National Bank*, 263 Fed. 218, upon which the Court of Appeals relied.

We think the court below failed to take into consideration that in this case the record shows that the Emergency Fleet Corporation was not acting for its own corporate account, but was acting

merely as an agent of the Shipping Board. pointed out in the Statement in this brief, appears from the agreed statement of facts t during the period when the messages involved this suit were sent the Fleet Corporation in all its activities "conformed to the directions w regard thereto contained in the resolution of United States Shipping Board adopted Septem 30, 1921," which resolution related only to the de gation to the Fleet Corporation of certain activit authorized by the Merchant Marine Act, 19 (R. 14, 30–32.) We believe this can be constru only as meaning that during the period in quest all of the activities of the Fleet Corporation w delegated activities, performed as agent of Shipping Board.

Respondent has argued that the Fleet Corpo tion can send a telegram or do any other act o through an officer or agent; that this Court has h in *United States* v. *Strang*, 254 U. S. 491, that agent of the Fleet Corporation is not an agent the United States; and that to hold that the age of the Fleet Corporation who sent the telegra here in question were agents of a department of government in sending such telegrams would the fore involve a reconsideration of the quest decided by this Court in *United States* v. *Strang*

In *United States* v. *Strang* the sole question fore the Court was whether an employee of

Fleet Corporation was an officer or agent of the United States within the meaning of Section 41 of the Criminal Code, which prohibited anyone personally interested in a corporation, joint-stock company, association, or firm from acting as an officer or agent of the United States for the transaction of business with such corporation, joint-stock company, association, or firm. The Court was called upon to construe a criminal statute and followed the rule of strict construction applicable to such cases.

We do not question that an employee of the Fleet Corporation is primarily an agent of the Fleet Corporation, and not of the United States, or that, as held in *United States* v. *Strang*, where such employee performs acts lawful for an agent of the Fleet Corporation but unlawful for an agent of the United States, he is not to be regarded as an agent of the United States for purposes of determining whether he has violated a criminal statute. But it does not follow that where the Fleet Corporation, through an employee duly authorized, performs acts which the United States has delegated to it, such acts are not performed by it as agent of the United States.

Respondent's argument must go to the length of contending that a corporation can never act as an agent of the United States. A corporation can act only through its officers and agents, and therefore

when Congress authorized the Shipping Board to perform certain activities by utilizing the Fleet Corporation as its agent, it must have contemplated that the Fleet Corporation would act through its officers and agents; and that the acts of such officers and agents, duly authorized, would be the acts of the Fleet Corporation itself as agent of the Shipping Board.

In *Sloan Shipyards* v. *United States Fleet Corporation*, 258 U. S. 549, 567, this Court recognized that the Fleet Corporation might act as an agent of the United States, although it was held that under the circumstances there disclosed the Fleet Corporation might be sued because it was in no better position to claim immunity from suit than an individual agent would have been, and the Court said of such an individual agent that—

> An instrumentality of government he might be and for the greatest ends, but the agent, because he is agent, does not cease to be answerable for his act.

Other cases in which it has been recognized that the Fleet Corporation may act as an agent of the United States are *Ingram Day Lumber Company* v. *United States S. B. E. F. Corp.*, 267 Fed. 283, 287–288; *Astoria Marine I. Works* v. *United States Ship. Board*, 295 Fed. 415; *United States Ship. B. E. F. Corp.* v. *Galveston Dry Dock & C. Co.*, 13 F. (2d) 607, 611–612.

II

THE ACTIVITIES OF THE EMERGENCY FLEET CORPORATION HERE INVOLVED WERE GOVERNMENTAL IN CHARACTER, AND IN ANY EVENT THE UNITED STATES IS ENTITLED TO THE BENEFITS OF THE POST ROADS ACT FOR ANY MESSAGES THE COST OF WHICH IS A DIRECT CHARGE AGAINST THE PUBLIC TREASURY, WITHOUT REGARD TO THE CHARACTER OF THE PARTICULAR ACTIVITIES TO WHICH THE MESSAGES RELATE

Respondent has argued that the activities of the Emergency Fleet Corporation are commercial and not governmental in character, and that the preferential government rate ought not to be extended to commercial activities in which persons other than the government may engage. Respondent suggests that the distinction between government and business is that government is necessarily exclusive, while business may be competitive.

Whatever may be the case with respect to activities of the Emergency Fleet Corporation on its corporate account, it can hardly be doubted that its activities as agent of the United States are governmental in character. The United States does not and can not hold property, as a monarch may, for private and personal purposes. Under a republican form of government, the whole property of the government is owned and held by it for public uses. *Van Brocklin* v. *Tennessee*, 117 U. S. 151, 158, 174; *Light* v. *United States*, 220 U. S. 523;

Ches. & Del. Canal Co. v. *United States*, 250 U. S. 123.

That the activities of the Emergency Fleet Corporation as agent of the United States were governmental becomes even clearer from an examination of the Merchant Marine Act, 1920, and the circumstances under which it was passed. For war purposes the government had obtained a great number of ships and property for use in connection with shipping. The operation of these ships in commercial transportation in connection with the government's war activities was undoubtedly a governmental function. *United States* v. *Porto Rico Fruit Union*, 12 F. (2d) 961. After the war some disposition of the vast amount of property which had been acquired was necessary. Section 1 of the Merchant Marine Act, 1920, provided:

> That it is necessary for the national defense and for the proper growth of its foreign and domestic commerce that the United States shall have a merchant marine of the best equipped and most suitable types of vessels sufficient to carry the greater portion of its commerce and serve as a naval or military auxiliary in time of war or national emergency, ultimately to be owned and operated privately by citizens of the United States; * * *.

Section 7 authorized and directed the Shipping Board to investigate and determine what steamship lines should be established and put in operation, and

the kind of vessels to be employed thereon, and then provided:

> * * * The board is authorized to sell, and if a satisfactory sale can not be made, to charter such of the vessels referred to in section 4 of this Act or otherwise acquired by the board, as will meet these requirements to responsible persons who are citizens of the United States who agree to establish and maintain such lines upon such terms of payment and other conditions as the board may deem just and necessary to secure and maintain the service desired; and if any such steamship line is deemed desirable and necessary, and if no such citizen can be secured to supply such service by the purchase or charter of vessels on terms satisfactory to the board, the board shall operate vessels on such line until the business is developed so that such vessels may be sold on satisfactory terms and the service maintained, or unless it shall appear within a reasonable time that such line can not be made self-sustaining. * * *

It is apparent that the Merchant Marine Act contemplated, not that the government should compete with citizens in the shipping business, but only that the government should dispose of the shipping property acquired by it for war purposes and should supplement the shipping business carried on by citizens to such extent as might be necessary in order to establish and maintain an adequate merchant marine.

And even if the government had determined to go into the shipping business in competition with citizens, its activities therein would have been governmental. In *Berizzi Bros. Company* v. *S. S. Pesaro*, 271 U. S. 562, the *Pesaro* was owned, possessed, and operated for trade purposes by the Italian Government. She was libeled *in rem* in the United States District Court for the Southern District of New York. That court dismissed the libel for want of jurisdiction, on the ground that the vessel was immune from process of the courts of the United States. This Court, in affirming the judgment of the District Court, said (page 574):

> We think the principles are applicable alike to all ships held and used by a government for a public purpose, and that when, for the purpose of advancing the trade of its people or providing revenue for its treasury, a government acquires, mans and operates ships in the carrying trade, they are public ships in the same sense that warships are. We know of no international usage which regards the maintenance and advancement of the economic welfare of a people in time of peace as any less a public purpose than the maintenance and training of a naval force.

But while we have thought that we should not leave unchallenged respondent's suggestion that the activities of the Emergency Fleet Corporation here involved were commercial and not governmental in character, there is nothing in Section 5266, R. S., which makes the benefits of that section

dependent on the character of the activities to which any particular messages relate. The section by its terms applies broadly to all messages "between the several Departments of the Government and their officers and agents." There is nothing to suggest an exception with respect to messages sent in connection with activities not strictly governmental in character and no reason why such an exception should be implied.

By the Post Roads Act the government gave telegraph companies valuable rights. In return it was to receive the right to transmit messages at rates to be fixed by one of its officers. The purpose of this provision must have been to effect a saving for the public treasury, and the character of particular messages has nothing to do with such saving.

Looking, therefore, to the purpose of Section 5266, R. S., it should be applicable to all messages from or to officers or agents of the United States the cost of which is a charge against the public treasury, and this has been the practical construction placed upon the section by the United States and the respondent for many years.

In 14 Op. A. G. 278 it appeared that the then president of the respondent had written to the Postmaster General in part as follows:

> A district attorney of the United States applied for an order directing that his messages relating to his official business be received and payment accepted at Government rates. I expressed the opinion that

> the rates which the Postmaster General is authorized to fix are applicable only to communications exchanged between the several Departments of the Government and their officers and agents, and not upon communications between such agents directly. But as such a construction, if accepted, would be difficult to enforce, I suggested that the test, applicable to all cases where claim is made that messages should be sent at Government rates, should be this: If the tolls are to become a charge against the United States, payable out of the Treasury, then the message should be sent at Government rates; but if, as in the case of a United States marshal or attorney, the disbursements for telegraphing are payable out of official fees or commissions or from the proceeds of penalties or forfeitures, then the Government rates should not apply.

The Attorney General, after pointing out that district attorneys and marshals were required to account for all fees received by them and to pay over the same into the Treasury of the United States, retaining therefrom a compensation fixed by law for their services, concluded:

> Clearly, to my mind, the intent of Congress was that telegraph companies, operating under the act of July 24, 1866, should transact the business of the Government at rates fixed by the Postmaster General, and it is of minor importance as to who sends or receives the telegram. My opinion, therefore, is that the Departments, their officers

> and agents, may interchangeably telegraph each other, as hereinbefore stated, upon official business, subject only to the limitation that the telegraphing must be in cases where the rates are payable out of public moneys, or are to be accounted for to the Government by the officer making the expenditures.

Both parties, therefore, thought that the test of the applicability of the statute was whether the cost of the messages in question was chargeable to the public treasury; the only difference between them was that the Attorney General held that the statute applied whether the charges were payable directly out of public moneys or were to be accounted for to the government by the officer making the payment, while the president of the respondent either did not realize that district attorneys and marshals were required to account for fees received by them or thought that the statute was applicable only where the charges were *directly* payable out of the public treasury.

It appears from the record (R. 18–19) that the respondent has "continuously from the date of its acceptance of the restrictions and obligations and of the rights, powers and privileges" of the Post Roads Act extended the government rates with the right of priority in transmission "to the telegraphic communications of" various branches of the government and governmental bureaus, commissions, boards, and other organizations. Obviously this means all telegraphic communications,

and there has been no attempt to distinguish between messages relating to strictly governmental activities and those relating to activities which are to some extent commercial in character.

Section 5266 and its acceptance by the respondent constitutes a contract. The practical construction thus placed for over fifty years upon this contract by the parties to it can hardly be now rejected. *Topliff* v. *Topliff*, 122 U. S. 121; cf. *United States* v. *Alabama Railroad Company*, 142 U. S. 615, 621; *Potter* v. *Hall*, 189 U. S. 292, 300.

There can be no question that the cost of the telegrams here involved is chargeable to the public treasury. We have endeavored to show above that they were sent by the Emergency Fleet Corporation in connection with its activities as agent of the United States under authority delegated to it by the Shipping Board pursuant to the Merchant Marine Act, 1920. Section 14 of that Act required that after July 1, 1921, the net proceeds derived from all activities of the Shipping Board, "less such an amount as may be authorized annually by Congress to be withheld as operating capital" and less such sums as might be needed for the insurance and construction loan funds authorized by the Act, should be covered into the Treasury of the United States as miscellaneous receipts. Congress during the period here in question annually appropriated to the Shipping Board for the expenses of the Emergency Fleet Corporation, including, among other things, carrying out the provisions of the

Merchant Marine Act, 1920, the amount on hand at the beginning of each fiscal year, and the amount received during that fiscal year from the operation of ships, and since such amounts were insufficient, also appropriated large additional sums from the Treasury of the United States.

It is evident, therefore, that neither the amount on hand at the beginning of a fiscal year nor the amount received during the fiscal year by the Emergency Fleet Corporation from the operation of ships as agent of the Shipping Board belonged to the Emergency Fleet Corporation in its corporate capacity; that all such amounts were the property of the United States and could be used by the Shipping Board through the Emergency Fleet Corporation only when and if appropriated by Congress; and that Congress made appropriations for the expenses of the Emergency Fleet Corporation in carrying out the provisions of the Merchant Marine Act, thus recognizing the responsibility of the United States, as principal, for the expenses of its agent.

Under these circumstances it can not be doubted that the cost of messages sent by the Emergency Fleet Corporation in connection with its activities as agent of the United States was chargeable to the public treasury. That the Emergency Fleet Corporation may have had corporate funds, resulting from the original payment of $50,000,000 for its capital stock, is entirely immaterial. It is apparent that the expenses of the Emergency Fleet Cor-

poration in its activities as agent of the United States were to be paid from Congressional appropriations and not from corporate funds, even if it had such funds.

III

SECTION 5266, R. S., SHOULD BE CONSTRUED AS APPLICABLE TO TELEGRAMS TO OR FROM OUTSIDE PARTIES, NOT CONNECTED WITH THE GOVERNMENT, IF THE COST THEREOF IS A CHARGE AGAINST THE PUBLIC TREASURY

Respondent has claimed that certain of the telegrams involved in this case were not "between the several Departments of the Government and their officers and agents" within the meaning of Section 5266, R. S., because they were sent to persons not connected with the government or the Emergency Fleet Corporation.

It must be admitted that if the statute were to be construed *de novo* this claim would have considerable force. But, as pointed out above, for over fifty years the parties have construed Section 5266, R. S., as being applicable to all messages the cost of which is chargeable to the public treasury and have acted on that construction. It is true there is some language in 14 Op. A. G. 278, which suggests a more restricted meaning for the phrase "between the several Departments of the Government and their officers and agents," but the question was not actually involved, and the suggestion evidently was never acted upon. There can be no doubt, also, that the government may be as much interested in the cost

of a message sent by one of its agents to a private individual as of a message sent by him to another agent of the government. The purpose of the statute, therefore, is equally applicable to both messages.

It is apparent from the debates in the Senate on the bill which finally became the Post Roads Act that it was the intention of Congress that the rate fixed by the Postmaster General should be applicable to all governmental messages and not only to those messages which were both sent and received by an officer or agent of the government. On June 29, 1866, Mr. Sherman, who was in charge of the bill in the Senate, said (72 Congressional Globe, Part 4, 39th Congress, 1st Session, page 3482):

> This bill provides that for all messages sent by the Government, or by any officer of the Government, or to any officer of the Government, the Postmaster General shall have the right to prescribe the rates.

And it appears (id. page 3489) that on June 29, 1866, an amendment to the bill was offered which would have made it the duty of the Postmaster General annually to advertise for proposals "for doing the telegraphic business of the several departments of the Government of the United States" and to award a contract to the lowest bidder, and Mr. Sherman said with respect to this proposed amendment:

> The provision of the bill is much simpler and much better that the price of all messages sent by or to any officer of the Govern-

ment shall be fixed by the Postmaster General. It is much better to leave it with him than to open it to contract or competition. I hope, therefore, that the amendment will not be agreed to.

* * * * *

I hope that amendment will not be adopted. It will only put the Government of the United States to expense. It seems to me not necessary. The bill is very carefully guarded. We have put the price of Government messages in the power of the Postmaster General, who will always, as a matter of course, endeavor to get the business done at the lowest possible price consistent with the public interest.

The question here under consideration is, of course, not restricted to messages of the Emergency Fleet Corporation. All governmental messages, of every branch of the government, are involved. We believe that in view of the purpose of Section 5266, R. S., to save money for the public treasury, and the construction applied by the parties for many years, the Court should not now interpret the Act to be inapplicable to messages sent by an agent of the government to an outsider. To make the test as to whether a message is within the Act whether its cost is chargeable to the public treasury is consistent with the purpose of the Act, easy and certain of application, and in accord with the practice adopted by the parties.

CONCLUSION

The judgment of the Court of Appeals of the District of Columbia should be reversed.

Respectfully submitted.

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NOVEMBER, 1927.

APPENDIX

The Merchant Marine Act, 1920

The pertinent sections of this Act (approved June 5, 1920, c. 250, 41 Stat. 988; U. S. C., Title 46, Secs. 861, 863, 864, 866, 871, 873, 886) are (italics ours):

> Sec. 1. That it is necessary for the national defense and for the proper growth of its foreign and domestic commerce that the United States shall have a merchant marine of the best equipped and most suitable types of vessels sufficient to carry the greater portion of its commerce and serve as a naval or military auxiliary in time of war or national emergency, ultimately to be owned and operated privately by citizens of the United States; and it is hereby declared to be the policy of the United States to do whatever may be necessary to develop and encourage the maintenance of such a merchant marine, and, in so far as may not be inconsistent with the express provisions of this Act, the United States Shipping Board shall, in the disposition of vessels and shipping property as hereinafter provided, in the making of rules and regulations, and in the administration of the shipping laws keep always in view this purpose and object as the primary end to be attained.
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SEC. 4. That all vessels and other property or interests of whatsoever kind, including vessels or property in course of construction or contracted for, acquired by the President through any agencies whatsoever in pursuance of authority conferred by the Acts or parts of Acts repealed by section 2 of this Act, or in pursuance of the joint resolution entitled "Joint resolution authorizing the President to take over for the United States the possession and title of any vessel within its jurisdiction, which at the time of coming therein was owned in whole or in part by any corporation, citizen, or subject of any nation with which the United States may be at war, or was under register of any such nation, and for other purposes," approved May 12, 1917, with the exception of vessels and property the use of which is in the opinion of the President required by any other branch of the Government service of the United States, are hereby transferred to the board: *Provided*, That all vessels in the military and naval service of the United States, including the vessels assigned to river and harbor work, inland waterways, or vessels for such needs in the course of construction or under contract by the War Department, shall be exempt from the provisions of this Act.

SEC. 5. That in order to accomplish the declared purposes of this Act, and to carry out the policy declared in section 1 hereof, the board is authorized and directed to sell, as soon as practicable, consistent with good business methods and the objects and purposes

to be attained by this Act, at public or private competitive sale after appraisement and due advertisement, to persons who are citizens of the United States except as provided in section 6 of this Act, all of the vessels referred to in section 4 of this Act or otherwise acquired by the board. Such sale shall be made at such prices and on such terms and conditions as the board may prescribe, but the completion of the payment of the purchase price and interest shall not be deferred more than fifteen years after the making of the contract of sale. The board in fixing or accepting the sale price of such vessels shall take into consideration the prevailing domestic and foreign market price of, the available supply of, and the demand for vessels, existing freight rates and prospects of their maintenance, the cost of constructing vessels of similar types under prevailing conditions, as well as the cost of the construction or purchase price of the vessels to be sold, and any other facts or conditions that would influence a prudent, solvent business man in the sale of similar vessels or property which he is not forced to sell. All sales made under the authority of this Act shall be subject to the limitations and restrictions of section 9 of the "Shipping Act, 1916," as amended.

* * * * *

SEC. 7. That the board is authorized and directed to investigate and determine as promptly as possible after the enactment of this Act and from time to time thereafter what steamship lines should be established

and put in operation from ports in the United States or any Territory, District, or possession thereof to such world and domestic markets as in its judgment are desirable for the promotion, development, expansion, and maintenance of the foreign and coastwise trade of the United States and an adequate postal service, and to determine the type, size, speed, and other requirements of the vessels to be employed upon such lines and the frequency and regularity of their sailings, with a view to furnishing adequate, regular, certain, and permanent service. The board is authorized to sell, and if a satisfactory sale can not be made, to charter such of the vessels referred to in section 4 of this Act or otherwise acquired by the board, as will meet these requirements to responsible persons who are citizens of the United States who agree to establish and maintain such lines upon such terms of payment and other conditions as the board may deem just and necessary to secure and maintain the service desired; and if any such steamship line is deemed desirable and necessary, and if no such citizen can be secured to supply such service by the purchase or charter of vessels on terms satisfactory to the board, the board shall operate vessels on such line until the business is developed so that such vessels may be sold on satisfactory terms and the service maintained, or unless it shall appear within a reasonable time that such line can not be made self-sustaining. The Postmaster General is authorized, notwithstanding the Act

entitled "An Act to provide for ocean mail service between the United States and foreign ports, and to promote commerce," approved March 3, 1891, to contract for the carrying of the mails over such lines at such price as may be agreed upon by the board and the Postmaster General: *Provided*, That preference in the sale or assignment of vessels for operation on such steamship lines shall be given to persons who are citizens of the United States who have the support, financial and otherwise, of the domestic communities primarily interested in such lines if the board is satisfied of the ability of such persons to maintain the service desired and proposed to be maintained, or to persons who are citizens of the United States who may then be maintaining a service from the port of the United States to or in the general direction of the world market port to which the board has determined that such service should be established: *Provided further*, That where steamship lines and regular service have been established and are being maintained by ships of the board at the time of the enactment of this Act, such lines and service shall be maintained by the board until, in the opinion of the board, the maintenance thereof is unbusinesslike and against the public interests: *And provided further*, That whenever the board shall determine, as provided in this Act, that trade conditions warrant the establishment of a service or additional service under Government administration where

a service is already being given by persons, citizens of the United States, the rates and charges for such Government service shall not be less than the cost thereof, including a proper interest and depreciation charge on the value of Government vessels and equipment employed therein.

* * * * *

SEC. 12. That all vessels may be reconditioned and kept in suitable repair and until sold shall be managed and operated by the board or chartered or leased by it on such terms and conditions as the board shall deem wise for the promotion and maintenance of an efficient merchant marine, pursuant to the policy and purposes declared in sections 1 and 5 of this Act; *and the United States Shipping Board Emergency Fleet Corporation shall continue in existence and have authority to operate vessels, unless otherwise directed by law, until all vessels are sold in accordance with the provisions of this Act,* the provision in section 11 of the "Shipping Act, 1916," to the contrary notwithstanding.

* * * * *

SEC. 14. *That the net proceeds derived by the Board prior to July 1, 1921, from any activities authorized by this Act, or by the "Shipping Act, 1916," or by the Acts specified in section 2 of this Act,* except such an amount as the board shall deem necessary to withhold as operating capital, for the purposes of section 12 hereof, and for the insurance fund authorized in section 10 hereof,

and for the construction loan fund authorized in section 11 hereof, *shall be covered into the Treasury of the United States to the credit of the board and may be expended by it, within the limits of the amounts heretofore or hereafter authorized, for the construction, requisitioning, or purchasing of vessels. After July 1, 1921, such net proceeds, less such an amount as may be authorized annually by Congress to be withheld as operating capital, and less such sums as may be needed for such insurance and construction loan funds, shall be covered into the Treasury of the United States as miscellaneous receipts.* The board shall, as rapidly as it deems advisable, withdraw investment of Government funds made during the emergency under the authority conferred by the Acts or parts of Acts repealed by section 2 of this Act and cover the net proceeds thereof into the Treasury of the United States as miscellaneous receipts.

* * * * *

SEC. 35. *That the power and authority vested in the board by this Act, except as herein otherwise specifically provided, may be exercised directly by the board, or by it through the United States Shipping Board Emergency Fleet Corporation.*

APPROPRIATION ACTS

The Sundry Civil Act, approved June 5, 1920 (c. 235, 41 Stat. 874, 891), provided:

> The expenses of the United States Shipping Board Emergency Fleet Corporation, during the fiscal year ending June 30, 1921, for administrative purposes, the payment of claims arising from the cancellation of contracts, damage charges and miscellaneous adjustments, maintenance and operation of vessels, and the completion of vessels now under construction, shall be paid from the following sources: (a) The amount on hand July 1, 1920; (b) the amount received during the fiscal year 1921 from the operation of ships; (c) not to exceed $15,000,000 from deferred payments on ships sold prior to the approval of this Act; (d) not to exceed $25,000,000 from plant and material sold during the fiscal year 1921; and (e) not to exceed $30,000,000 from ships sold during the fiscal year 1921: * * *.

The Sundry Civil Act, approved March 4, 1921 (c. 161, 41 Stat. 1367, 1382), provided:

> The expenses of the United States Shipping Board Emergency Fleet Corporation during the fiscal year ending June 30, 1922, for administrative purposes, the payment of claims arising from the cancellation of contracts, damage charges and miscellaneous adjustments, maintenance and operation of vessels, the completion of vessels now under construction, and for carrying out the provisions of the Act entitled "An Act to provide for the promotion and maintenance of the American merchant marine, to repeal

certain emergency legislation, and provide for the disposition, regulation, and use of property acquired thereunder, and for other purposes," approved June 5, 1920, shall be paid from the following sources: (a) The amount on hand July 1, 1921; (b) the amount received during the fiscal year 1922 from the operation of ships, and (c) not to exceed $55,000,000 from deferred payments on ships sold prior to the approval of this Act, from plant and material sold during the fiscal year 1922, and from ships sold during the fiscal year 1922: * * *.

The Urgent Deficiencies Act, approved August 24, 1921 (c. 89, 42 Stat. 192), provided:

> For expenses of the United States Shipping Board Emergency Fleet Corporation for losses due to the maintenance and operation of ships and for administrative purposes, $48,500,000: * * *.

The Sundry Civil Act, approved June 12, 1922 (c. 218, 42 Stat. 635, 647), provided as follows:

> For expenses of the United States Shipping Board Emergency Fleet Corporation during the fiscal year ending June 30, 1923, for administrative purposes, miscellaneous adjustments, losses due to the maintenance and operation of ships, for the tie-up, reconditioning, and repair of ships, and for carrying out the provisions of the Merchant Marine Act, 1920, (a) the amount on hand July 1, 1922; (b) $50,000,000: *Provided*, That no part of this sum shall be used for the payment of claims other than those resulting

from the current maintenance and operation of vessels; (c) the amount received during the fiscal year 1923 for the operation of ships.

All of these appropriations were made under the heading "Shipping Board."

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